Supreme Court, U.S.
FILED
JUL 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1152

IN THE
Supreme Court of the United States
October Term, 1989

STATE OF FLORIDA,

Petitioner,

v.

NADINE NELSON, *et al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

RAY W. PENNEBAKER
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Volusia County
P. O. Box 429
DeLand, Florida 32721

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

1.

Whether a state or a political subdivision thereof may restrict purely commercial speech on public lands dedicated to recreational purposes to only that commercial speech related to the sale or rental of services or goods intended for use or consumption within the public recreational area? Stated inversely, may a governmental entity ban within a public recreation area purely commercial speech related to the sale or rental of items intended for use or consumption outside of the recreation area?

2.

Whether the four-part analysis applicable to commercial speech cases established by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), as later interpreted in *Board of Trustees of State University of N.Y. v. Fox*, ___ U.S. ___, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), was misapplied by the Fifth District Court of Appeals through the use of a least-restrictive-means standard?

PARTIES TO THE PROCEEDINGS

Petitioner

The State of Florida, Volusia County (a political subdivision thereof), appellant below.

Respondents

Nadine Nelson, Sharon Rongstad, Sharon Bertalli, Albert Livingstone, Cynthia Ann Kerr, Margo Madden, Joseph McGreevy, and Paula Leggett, appellees below.

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No. _____

IN THE

Supreme Court of the United States

October Term, 1989

STATE OF FLORIDA,

Petitioner

v.

NADINE NELSON, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

The petitioner respectfully requests that a writ of certiorari issue to review the decision of the Fifth District Court of Appeal rendered in this cause on October 19, 1989.

OPINIONS BELOW

The unpublished order of the trial court was rendered on February 28, 1989. A copy of the order is included in the appendix.

The October 19, 1989, opinion of the Fifth District Court of Appeal, *State v. Nelson*, 533 So.2d 195 (Fla. 5th DCA 1989), is the only published opinion issued by a state court. Copies of that opinion; the order denying the consolidated motions for rehearing, rehearing *en banc*, and for certification of the issue to the Florida Supreme Court; as well as the order in which the Florida Supreme Court declined to accept discretionary jurisdiction are included in the appendix.

JURISDICTIONAL STATEMENT

The decision of the Fifth District Court of Appeal was rendered on October 19, 1989. Consolidated motions for rehearing, rehearing *en banc*, and for certification of the issue to the Florida Supreme Court were denied on December 7, 1989. The Florida Supreme Court denied review on April 17, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The ordinance which was held unconstitutional provides:

> Section 4.08 Soliciting and Canvassing Prohibited.
>
> (a) By other than licensed concessionaires of goods and services for use or consumption on beach. No person other than a concessionaire licensed under the provisions of Section 8 of this Code shall solicit or canvass for the sale or rental of merchandise, services, goods or property of any kind or character intended for use or consumption on the beach.
>
> (b) By licensed concessionaires. No licensed concessionaire shall solicit or canvass for the sale or rental of any merchandise, services, goods or property of any kind or character except from within 10 feet of his licensed premises or vehicle.
>
> (c) By any person of goods and services for use or consumption off beach. No person shall solicit or canvass for the sale or rental of any merchandise, services, goods or property of any kind or character to be delivered or performed off the beach.

Volusia County Ordinance 87-36, § 4.08.

STATEMENT OF THE CASE

Volusia County, a political subdivision of the state of Florida, enacted an ordinance that limited commercial speech on its public beaches to that related to the provision of goods and services which were to be used on the beaches. Stated otherwise, the sale on the beaches of goods or services which were to be used off of the beaches was prohibited under the ordinance.

The respondents were time-share salespersons at the time they were charged with violating the county ordinance. Their cases were consolidated in the trial court. Their counsel filed a motion seeking a declaration by the trial court that the ordinance was unconstitutional. A hearing was held on the motion, at which the defense argued that the ordinance was facially invalid under the First Amendment. The trial court rendered an order declaring the ordinance to be facially unconstitutional under the both the state and federal constitutions. The opinion of that court does not detail specific bases for its decision.

On appeal the state and county argued that the ordinance did not violate the First Amendment rights of the defendants. It was argued that the restrictions represented a valid exercise of the police power. The defense argued to the contrary, and the Fifth District Court of Appeal agreed. The opinion cited directly a provision of the state constitution, through which "[t]he scope of the protection accorded to freedom of expression in Florida under article I, section 4, is the same as is required under the First Amendment." *Department of Education v. Lewis*, 416 So.2d 455, 461 (Fla. 1982) (citation omitted). The decision below turned on the court's holding that:

> Under the four part analysis of governmental regulation of commercial speech enunciated by the

> United States Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), the complete ban of solicitation or canvassing for sale or rental of off-beach goods or services contained in section 4.08 must fail. The complete suppression, under the police power, of commercial speech relating to the solicitation for off-beach goods and services is more extensive than necessary to further any alleged governmental interest in promoting the public welfare by protecting the privacy and aesthetic sensibilities of members of the public who are on the beach.

State v. Nelson, 553 So.2d 195, 197 (Fla. 5th DCA 1989).

The state sought rehearing, pursuant to Florida Rule of Appellate Procedure 9.330, in part on the ground that the appellate court had overlooked or misapprehended the *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980), analysis as interpreted in *Board of Trustees of State University of N.Y. v. Fox*, ___ U.S. ___, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). The motion was denied without further discussion.

The state petitioned the Florida Supreme Court to exercise its discretionary jurisdiction in order to review the holding of the district court. The merits were never reached because the state supreme court declined to accept jurisdiction.

ARGUMENT

THE STATE APPELLATE COURT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DIRECTLY ADDRESSED AND SETTLED BY THIS COURT. FURTHER, ALTHOUGH THERE ARE NO CASES FROM THIS COURT DIRECTLY ON POINT, THE FEDERAL QUESTION IN THIS CASE WAS DECIDED IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

IMPORTANCE OF FEDERAL LAW QUESTION

The decision of the Fifth District Court of Appeal holding that the county government could not constitutionally restrict purely commercial speech on its beaches to that spoken by persons selling goods or services for use on those beaches is important because of its potential precedential impact. The ruling will affect the administration of public beaches because it will open the door to challenges directed at similar ordinances both within and without the state of Florida. There is a very real possibility that the opinion may be cited in challenges to similar federal regulations as well. Commercial activity within the National Forest Service and National Park System is restricted in a similar manner. For example, the Code of Federal Regulations provides in relevant parts:

> The following are prohibited [on National Forest system land]:
>
> * * *
>
> Selling or offering for sale any merchandise or conducting any kind of work activity or service

unless authorized by Federal law, regulation, or special-use authorization.

36 C.F.R. § 261.10(c).

> Commercial notices or advertisements shall not be displayed, posted, or distributed on federally owned or controlled lands within a park area unless prior written permission has been given by the Superintendent. Such permission may be granted only if the notice or advertisement is *of goods, services, or facilities available within the park area* and such notices and advertisements are found by the Superintendent to be *desirable and necessary for the convenience and guidance of the public.*

36 C.F.R. § 5.1 (emphases added).

> Engaging in or soliciting any business in park areas, except in accordance with the provisions of a permit, contract, or other written agreement with the United States, except as such may be specifically authorized under special regulations applicable to a park area, is prohibited.

36 C.F.R. § 5.3.

Concession contracts and permits are dealt with under part 51 of the regulations. The portions material to the instant issue provide:

> **Policy.**
>
> It is the policy of the Secretary, as mandated by law, to permit concessions in park areas only under carefully controlled safeguards against unregulated and indiscriminate use so that heavy visitation will not unduly impair park values and resources. *Concession activities in park areas shall be limited to those that are necessary and ap-*

> *propriate for public use and enjoyment of the park areas in which they are located* and that are consistent to the highest practicable degree with the preservation and conservation of the park areas.

36 C.F.R. § 51.2 (emphasis added).

The policy of the county in enacting the ordinance, which was not included in the reported decision but was a part of the record on appeal, provides:

> The County Council finds that the Atlantic Ocean beach is and should be managed as an enormous public park open to all people. The beach is many different things to many different people. Local government policy toward the beach should be guided by the recognition that proper management of the beach is vital to the economic development of the County and that all reasonable competing uses of the beach must be protected and balanced. The highest value should be given to protecting and enhancing the quality of life of and on the beach and the public right of access to the beach in order to enjoy the beach as a source as a pleasant, safe, clean, and wholesome recreation.

Volusia County Ordinance 87-36, § 1.03.

Although the decision of the Fifth District Court of Appeal deals directly with the sale or rental of goods or services on a beach, it can be readily extended to any public recreational area. The decision inescapably leads to the broader question whether governmental entities may constitutionally restrict commercial speech in a public recreational area to that which enhances the public's use and enjoyment of the area. The decision below expressly holds that "the complete ban of solicitation or canvassing for sale or rental of off-beach goods or services contained in section 4.08 must fail."

Applying the holding to public parks in general, the conclusion is that under the rationale employed by the court below the gates to all parks must be thrown open to virtually any and all salespersons who wish to sell their wares. Such a holding flies in the face of common practice. Commercial speech on public beaches, in parks and other recreational areas is in fact limited to that related to the provision of goods and services for use in the recreational areas. Imagine, for example, numerous salespersons selling resort time shares or sets of encyclopedias competing with a licensed ice cream vendor in a public park. While the latter serves to enhance the public's use of the area, the others are at best a distraction to those who are seeking to enjoy the use of the recreational facilities.

Because of the potentially wide ranging impact of this decision, which was based upon an erroneous interpretation of a federal constitutional law, this Court should review the case to settle the issue.

CONFLICT WITH PRIOR HOLDINGS OF THIS COURT

The specific issue whether commercial speech can constitutionally be limited in public recreation areas to that related to the provision of goods and services for use within the recreation area has not been ruled upon directly by this Court. However, the holding of the Fifth District Court of Appeal conflicts with prior commercial speech holdings of this Court rendered in other contexts.

This Court has stated that it "continue[s] to observe the distinction between commercial and noncommercial speech, indicating that the former could be forbidden and regulated in situations where the latter could not be." *Metromedia,*

Inc. v. City of San Diego, 453 U.S. 490, 506, 101 S.Ct. 2882, 2892, 69 L.Ed.2d 800 (1981).

In *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, supra,* this Court held:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is more extensive than necessary to serve that interest.

The fourth prong of the Central Hudson analysis was later interpreted by this Court in *Board of Trustees of State University of N.Y. v. Fox, supra:*

> Our cases have repeatedly stated that governmental restrictions upon commercial speech may be no more broad or no more expansive than "necessary" to serve its substantial interests... If the word "necessary" is interpreted strictly, these statements would translate into the "least restrictive means" test... Whatever the conflicting tenor of our prior dicta may be, we now focus upon this specific issue for the first time, and conclude that the reason of the matter requires something short of a least-restrictive-means standard.

Id. 109 S.Ct. at 3032-3033

In short, the decision below conflicts with the prior holdings of this Court. The Volusia County ordinance represents

a constitutionally sound regulation of commercial speech on its public beaches.

CONCLUSION

The petition for writ of certiorari should be granted because the Fifth District Court of Appeal decided an important question of federal law which has not been, but should be, settled by this Court. Although the precise issue has not been settled, the decision below also conflicts with applicable decisions of this Court.

Respectfully submitted,

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COUNSEL FOR PETITIONER

No. _____

IN THE

Supreme Court of the United States

October Term, 1989

STATE OF FLORIDA,

Petitioner,

v.

NADINE NELSON, *et al.*,

Respondents

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE COUNTY COURT,
SEVENTH JUDICIAL CIRCUIT,
IN AND FOR
VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

v.

NADINE NELSON, CASE NO. CTC88-22946
SHARON RONGSTAD, CASE NO. CTC88-23318 & 88-26134
SHARON BERTALLI, CASE NO. CTC88-27170
ALBERT LIVINGSTONE, CASE NO. CTC88-17745 & 88-18572
CYNTHIA ANN KERR, CASE NO. CTC88-26831
MARGO MADDEN, CASE NO. CTC88-21877
JOSEPH McGREEVY, CASE NO. CTC88-21870
PAULA LEGGETT, CASE NO. CTC88-16813 & 88-17989
Defendants.

FINAL JUDGMENT

This cause came on to be heard on the defendants motion to declare Section 4.08 of the Volusia County Beach Code unconstitutional. Each defendant was arrested for soliciting "Time-Share" on the Atlantic Ocean Beach within Volusia County.

Section Two of Beach Code defines "Solicit or Canvas" as follows:

> Any act, delivery, or exchange not initiated by the prospective customer or which directs attention to any business, mercantile or commercial activity, for the purpose of directly or indirectly promoting

commercial interests through sales, rentals, or any exchange of value.

Section 4.08 of the Beach Code provides that soliciting and canvassing is prohibited wherein it is stated:

> a. By other than licensed concessionaires of goods and services for use or consumption on beach. No person other than a concessionaire licensed under the provisions of Section 8 of this Code shall solicit or canvass for the sale or rental of merchandise, services, goods, or property of any kinds or character intended for use or consumption on the beach.
>
> b. By licensed concessionaires. No licensed concessionaire shall solicit or canvass for the sale or rental of any merchandise, services, goods or property of any kind or character except from within or within 10 feet of his licensed premises or vehicle.
>
> c. By any person of goods and services for use or consumption off beach. No person shall solicit or canvass for the sale or rental of any merchandise, services, goods or property of any kind or character to be delivered or performed off the beach.

The defendants argue that said section is in violation of the 1st, 5th and 14th Amendment of the United States Constitution. Article 1, Section 4 of the Florida Constitution provides:

> "Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press." (underlining supplied).

Volumes of case law have been written on 1st Amendment rights and counsel for both the County and the Defendants have cited numerous cases on this subject and the Court has reviewed all of them.

In State ex rel. Wilson et al. v. Russell, 1 So.(2d) 569 (Florida Supreme Court, 1941), the Supreme Court was called upon to determine the constitutionality of the following ordinance:

> "That from and after the passage of this ordinance it shall be unlawful for any person to distribute pamphlets, circulars, or other similar printed or typewritten matter among citizens of the City of Clearwater without first securing a permit from the Chief of Police".

The Supreme Court said when it wrote its decision in 1941:

> "If so much had not been recently written by the Supreme Court of the United States and become the recognized law of the land, it might be expedient to express our views in regard to the validity of this ordinance at some length, but ordinances of this sort have been considered and discussed in lengthy opinions in the cases of Lovell v. City of Griffin, 303 US.444, to 453, 58S.CT. 666, 82 L.Ed. 949; and Schneider v. Town of Irvington (Young v. People of the State of California, Snyder v. City of Milwaukee and Nichols v. Commonwealth of Massachusetts), 308 U.S. 147, to 165, 60 S.CT. 146, 84 L.Ed. 155 and such ordinances definitely held to be invalid because of invading the right of free speech and free press as guaranteed under the Constitution, and it appears to us that no useful purpose can be served by attempting to repeat or add to what has been said in that

> regard by the highest Court in the land. On authority of the opinions and judgments in the cases above cited, the return is held insufficient and petitioners are discharged".

Taking a lesson from the Supreme Court of Florida in the above cited case, it would be redundant for this Court to cite the hundreds of cases that followed State ex rel. Wilson et al. v. Russell (supra).

Suffice to say that Section 4.08 of the Beach Code is patently unconstitutional under the 1st Amendment and the 14th Amendment to the Federal Constitution and Article 1, Section 4, of the Florida Constitution.

It is therefore;

ORDERED and ADJUDGED that the Section 4.08 of the Beach Code is Unconstitutional and unenforceable as written. Regulation of solicitation might be in order but the Court leaves that task to the governing body of Volusia County (County Council).

DONE AND ORDERED in Chambers, Daytona Beach, Volusia County, Florida this 28th day of February, 1989.

_____/s/_____

NORTON JOSEPHSON
County Court Judge

CERTIFICATION

The Court determines that the above opinion is of great public interest and certifies this case to the 5th D.C.A. with the following question:

> "Is Section 4.08 of the Beach Code of Volusia County, Florida constitutional"?

Said section reads as follows:

a. By other than licensed concessionaires of goods and services for use or consumption on beach. No person other than a concessionaire licensed under the provisions of Section 8 of this Code shall solicit or canvass for the sale or rental of merchandise, services, goods, or property of any kinds or character intended for use or consumption on the beach.

b. By licensed concessionaires. No licensed concessionaire shall solicit or canvass for the sale or rental of any merchandise, services, goods or property of any kind or character except from within or within 10 feet of his licensed premises or vehicle.

c. By any person of goods and services for use or consumption off beach. No persons shall solicit or canvass for the sale or rental of any merchandise, services, goods or property of any kind or character to be delivered or performed off the beach.

Copies to:

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STATE of Florida, Appellant,

v.

Nadine NELSON, *et al.*, Appellees.

No. 89-510.

District Court of Appeal of Florida, Fifth District.

Oct. 19, 1989.

Rehearing Denied Dec. 17, 1989.

COWART Judge.

Article 1, Section 4 of the Florida Constitution provides:

> Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.

Section 4.08 of the Beach Code of Volusia County provides:

> *Section 4.08. Soliciting and Canvassing Prohibited.*
>
> (a) *By other than licensed concessionaires of goods and services for use or consumption on beach.* No person other than a concessionaire licensed under the provisions of Section 8 of this Code shall solicit or canvass for the sale or rental of merchandise, services, goods, or property of any kind or character intended for use or consumption on the each.
>
> (b) *By licensed concessionaires.* No licensed concessionaire shall solicit or canvass for the sale or rental of any merchandise, services, goods or property of any kind or character except from

within or within 10 feet of his licensed premises or vehicle.

(c) *By any person of goods and services for use or consumption off beach.* No person shall solicit or canvass for the sale or rental of any merchandise, services, goods or property of any kind or character to be delivered or performed off the beach.

Citing *State ex rel. Wilson v. Russell,* 146 Fla. 539, 1 So.2d 569 (1941), the County Court of Volusia County held that section 4.08 of the Beach Code of Volusia County was unconstitutional under the First and Fourteenth Amendments to the United States Constitution and Article 1, Section 4, of the Florida Constitution.

Under the four part analysis of governmental regulation of commercial speech enunciated by the United States Supreme Court in *Central Hudson Gas & Electric Corporationsv. Public Service Comm., supra,* the complete ban of solicitation or canvassing for sale or rental of off-beach goods or services contained in section 4.08 must fail. The complete suppression, under the police power, of commercial speech relating to the solicitation for off-beach goods and services is more extensive than necessary to further any alleged governmental interest in promoting the public welfare by protecting the privacy and aesthetic sensibilities of members of the public who are on the beach. The final judgment of the County Court is

AFFIRMED.

DAUKSCH and GOSHORN, JJ., concur.

IN THE
DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

STATE OF FLORIDA,

Appellant,

v.

CASE NO. 89-510

NADINE NELSON, *et al.*,

Appellee.

DATE: December 7, 1989

BY ORDER OF THE COURT:

ORDERED that Appellant's MOTION FOR REHEARING, MOTION FOR REHEARING *EN BANC,* MOTION FOR CERTIFICATION, filed November 3, 1989, is denied.

I hereby certify that the foregoing is (a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK

BY: _____/s/_____
Deputy Clerk

(COURT SEAL)

cc: Paul J. Dubbeld, Esq.
Office of the Attorney General, Daytona Beach

Dan Eckert, Esq.

Supreme Court of Florida

Tuesday, April 17, 1990

STATE OF FLORIDA,

Petitioner,

vs.

CASE NO. 75,279

NADINE NELSON, *et al.*,
DISTRICT COURT OF APPEAL,
5th District No. 89-510

Respondents.

This cause having heretofore been submitted to the Court on Jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

McDONALD, SHAW, BARKETT and GRIMES, JJ., Concur

OVERTON, Acting C.J., Dissents

A True Copy JB

TEST:

cc: Frank J. Habershaw, Clerk
(seal) V. Y. Smith, Clerk
_____s/s_____
Hon. Norton Josephson,
Judge (Retired)

Sid J. White
Clerk, Supreme Court

David S. Morgan, Esquire
Paul J. Dubbeld, Esquire
Daniel D. Eckert, Esquire

Supreme Court, U.S.
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(2)

No. 90-152

In The

Supreme Court of the United States

October Term, 1990

STATE OF FLORIDA,

Petitioner,

v.

NADINE NELSON, et al.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE FIFTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

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QUESTIONS PRESENTED

1.

Whether or not the decisions of the lower state tribunals establish adequate and independent state grounds thereby precluding review by this most Honorable Court.

2.

Whether the four-part analysis applicable to commercial speech cases established by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), as later interpreted in *Board of Trustees of State University of New York v. Fox*, ___ U.S. ___, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), was misapplied by the Fifth District Court of Appeals through the use of a least restrictive-means standard?

PARTIES TO THE PROCEEDINGS

Petitioner

The State of Florida, Volusia County (a political subdivision thereof), appellant below.

Respondents

Nadine Nelson, Sharon Rongstad, Sharon Bertalli, Albert Livingston, Cynthia Ann Cerr, Margo Madden, Joseph McGreevy, and Paula Leggett, appellees below.

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THE LOWER STATE TRIBUNALS HAVE DETERMINED THAT THE SUBJECT ORDINANCE IS UNCONSTITUTIONAL AND IN VIOLATION OF THE STATE OF FLORIDA CONSTITUTION. THERE IS NO CONFLICT OF DECISIONS AND THIS COURT SHOULD NOT GRANT THE GOVERNMENT'S REQUEST FOR CERTIORARI BECAUSE THE SUBJECT STATE DECISIONS ARE WELL FOUNDED IN STATE CONSTITUTIONAL LAW. THIS COURT SHOULD NOT VACATE THE JUDGMENT OF THE STATE TRIBUNALS IN ORDER TO GIVE AN UNSOLICITED OPPORTUNITY TO HAVE THE STATE COURTS REANALYZE THEIR OWN LAW. ALTERNATIVELY, THIS HONORABLE COURT SHOULD, PRIOR TO ISSUING ANY OPINIONS REGARDING THE FEDERAL LAW VIS-A-VIS THE FLORIDA CONSTITUTION, SHOULD REMAND THIS MATTER TO THE STATE COURTS FOR A RESOLUTION OF STATE-LAW DISPOSITION 6

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No. 90-152

In The

Supreme Court of the United States

October Term, 1990

STATE OF FLORIDA,

Petitioner,

v.

NADINE NELSON, et al.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE FIFTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

The respondents respectfully request that this court decline to issue a writ of certiorari to review the decision of the Fifth District Court of Appeal rendered in this cause on October 19, 1989.

OPINIONS BELOW

The unpublished order of the trial court was rendered on February 28, 1989. A copy of the order is included in the appendix.

The October 19, 1989, opinion of the Fifth District Court of Appeal, *State v. Nelson*, 533 So.2d 195 (Fla. 5th

DCA 1989), is the only published opinion issued by a state court. Copies of that opinion, the order denying the consolidated motions for rehearing, rehearing *en banc*, and for certification of the issue to the Florida Supreme Court, as well as the order in which the Florida Supreme Court declined to accept discretionary jurisdiction are included in the appendix.

JURISDICTIONAL STATEMENT

The decision of the Fifth District Court of Appeal was rendered on October 19, 1989. Consolidated motions for rehearing, rehearing *en banc*, and for certification of the issue to the Florida Supreme Court were denied on December 7, 1989. The Florida Supreme Court denied review on April 17, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The ordinance which was held unconstitutional provides:

Section 4.08 Soliciting and Canvassing Prohibited.

(a) *By other than licensed concessionaires of goods and services for use or consumption on beach.* No person other than a concessionaire licensed under the provisions of Section 8 of this Code shall solicit or canvass for the sale or rental of merchandise, services, goods or property of any kind or character intended for use or consumption on the beach.

(b) *By licensed concessionaires.* No licensed concessionaire shall solicit or canvass for the sale or rental of any merchandise, services, goods or property of any kind or character except from within 10 feet of his licensed premises or vehicle.

(c) *By any person of goods and services for use or consumption off beach.* No person shall solicit or canvass for the sale or rental of any merchandise, services, goods or property of any kind or character to be delivered or performed off the beach.

Volusia County Ordinance 87-36, § 4.08.

STATEMENT OF THE CASE

Volusia County, a political subdivision of the state of Florida, enacted an ordinance that eliminated commercial solicitation on its public beaches and allows for commercial free speech to that related to the provision of goods and services which were to be used on the beaches. Stated otherwise, commercial free speech for the sale on the beaches of goods or services which were to be used off of the beaches was prohibited under the ordinance.

The respondents were time-share salespersons at the time they were charged with violating the county ordinance. Their cases were consolidated by the trial court. Their counsel filed a motion seeking a declaration by the trial court that the ordinance was unconstitutional. A hearing was held on the motion, at which the defense argued that the ordinance was facially invalid under the First Amendment. The trial court rendered an order declaring the ordinance to be facially unconstitutional under *both* the state and federal constitutions: The opinion of that court provides extensive reference in that the said opinion states, "taking a lesson from the Supreme Court of Florida in the above-cited case, it would be redundant for this court to cite the hundreds of cases that followed *State ex rel. Wilson et al v. Russell,* 1 So.2d 569 (Fla. S.Ct. 1941).

On appeal the state and county argued that the ordinance did not violate the First Amendment rights of the defendants. It was argued that the restrictions represented a valid exercise of the police power. The defense argued to the contrary, and the Fifth District Court of Appeal agreed. The opinion cited directly a provision of the state constitution, through which "the scope of the protection accorded to freedom of expression in Florida under article I, section 4, is the same as is required under the First Amendment." *Department of Education v. Lewis,* 416 So.2d 445, 461 (Fla. 1982) (citation omitted). The decision below turned on the court's holding that:

> Under the four part analysis of governmental regulation of commercial speech enunciated by the United States Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm.,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341

> (1980), the complete ban of solicitation or canvassing for sale or rental of off-beach goods or services contained in section 4.08 must fail. The complete suppression, under the police power, of commercial speech relating to the solicitation for off-beach goods and services is more extensive than necessary to further any alleged governmental interest in promoting the public welfare by protecting the privacy and aesthetic sensibilities of members of the public who are on the beach.

State v. Nelson, 553 So.2d 195, 197 (Fla. 5th DCA 1989).

The state sought rehearing, pursuant to Florida Rule of Appellate Procedure 9.330, in part on the ground that the appellate court had overlooked or misapprehended the *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980), analysis as interpreted in *Board of Trustees of State University of N.Y. v. Fox*, ___ U.S. ___, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). The motion was denied without further discussion.

The state petitioned the Florida Supreme Court to exercise its discretionary jurisdiction in order to review the holding of the district court. The merits were never reached because the state supreme court rightfully declined to accept jurisdiction.

ARGUMENT

THE LOWER STATE TRIBUNALS HAVE DETERMINED THAT THE SUBJECT ORDINANCE IS UNCONSTITUTIONAL AND IN VIOLATION OF THE STATE OF FLORIDA CONSTITUTION. THERE IS NO CONFLICT OF DECISIONS AND THIS COURT SHOULD NOT GRANT THE GOVERNMENT'S REQUEST FOR CERTIORARI BECAUSE THE SUBJECT STATE DECISIONS ARE WELL FOUNDED IN STATE CONSTITUTIONAL LAW. THIS COURT SHOULD NOT VACATE THE JUDGMENT OF THE STATE TRIBUNALS IN ORDER TO GIVE AN UNSOLICITED OPPORTUNITY TO HAVE THE STATE COURTS REANALYZE THEIR OWN LAW. ALTERNATIVELY, THIS HONORABLE COURT SHOULD, PRIOR TO ISSUING ANY OPINIONS REGARDING THE FEDERAL LAW VIS-A-VIS THE FLORIDA CONSTITUTION, SHOULD REMAND THIS MATTER TO THE STATE COURTS FOR A RESOLUTION OF STATE-LAW DISPOSITION.

IMPORTANCE OF FEDERAL LAW QUESTION

That the importance of federal law question is nonexistent. The final judgment reflects a decision founded in both the 1st, 5th and 14th Amendment to the United States Constitution and Article 1, Section 4 of the Florida Constitution. The entire thrust of the decision of the initial lower tribunal reflects that Judge Josephson relied heavily upon the Florida Supreme Court decision of *Wilson et al. v. Russell, supra.* The court specifically stated in the final judgment that it was "redundant" to cite the hundreds of cases that followed the *Wilson* case (supra).

The initial lower tribunal's decision rests on an adequate and independent state ground. Therefore, this Most Honorable Court should not accept review of the judgment of the state court, *Herb v. Pitcairn,* 324 U.S. 117, 128,

89 L.Ed. 789, 65 S.Ct. 459 (1945). Accord, *Jankovich v. Indiana Toll Road Comm'n*, 379 U.S. 487, 13 L.Ed.2d 439, 85 S.Ct. 493 (1965); *Honeyman v. Hanan*, 300 U.S. 14, 18-19, 81 L.Ed. 476, 57 S.Ct. 350 (1937); *Fox Film Corp. v. Muller*, 296 U.S. 207, 80 L.Ed. 158, 56 S.Ct. 183 (1935); *Lynch v. New York* ex rel. *Pierson*, 293 U.S. 52, 79 L.Ed. 191, 55 S.Ct. 16 (1934); *McCoy v. Shaw*, 277 U.S. 302, 72 L.Ed. 891, 48 S.Ct. 519 (1928); *Petrie v. Nampa and Meridian Irrigation District*, 248 U.S. 154, 157, 63 L.Ed. 178, 39 S.Ct. 25 (1918); *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157 163-166, 61 L.Ed. 644, 37 S.Ct. 318 (1917); *Eustis v. Bolles*, 150 U.S. 361 (1893); *Murdock v. Memphis*, 20 Wall 590, 22 L.Ed. 429 (1875). The initial tribunal unambiguously held that the statute violates Florida's State Constitution. Therefore, this court is without power or constitutional authority to review the subject final judgment issued by the Honorable Norton Josephson. It is manifestly clear that the decision of the initial lower tribunal is not founded, as a sole basis for the decision, on the federal constitution. This court has repeatedly been alerted to opportunities to avoid federal constitutional issues by means of a state-law disposition, E.g., *Mills v. Rogers*, 457 U.S. 291, 302-306, 73 L.Ed.2d 16, 102 S.Ct. 2442 (1982); *City of Mesquite v. Aladdin's Castle, Inc.*, 445 U.S. 283, 294-295, 71 L.Ed.2d 152, 102 S.Ct. 1070 (1982); *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175, 53 L.Ed. 753, 29 S.Ct. 451 (1909). See generally *Hagans v. Lavine*, 415 U.S. 528, 546-547, and nn 12-13, 39 L.Ed.2d 577, 94 S.Ct. 1372 (1974).

The petitioner certainly has the burden of establishing jurisdiction for this Most Honorable Court. Mere speculation has proved inadequate in past attempts to

establish jurisdiction with this court. E.g., *Durley v. Mayo*, 351 U.S. 277, 285, 100 L.Ed. 1178, 76 S.Ct. 806 (1956); *Stembridge v. Georgia*, 343 U.S. 541, 547, 96 L.Ed. 1130, 72 S.Ct. 834 (1952); *Lynch v. New York* ex rel. *Pierson*, supra; *Johnson v. Risk*, 137 U.S. 300, 34 L.Ed. 683, 11 S.Ct. 111 (1890).

Finally, even when a state tribunal misconceives federal law, this court cannot and should not vacate that judgment merely to give an unsolicited opportunity for re-analyzation of its own law, *Herb v. Pitcairn*, supra, at 126, 89 L.Ed. 789, 65 S.Ct. 459. Accord, *Minnick v. California Dept. of Corrections*, 452 U.S. 105, 120-123, 68 L.Ed.2d 706, 101 S.Ct. 2211 (1981); *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-569, 91 L.Ed. 1666, 67 S.Ct. 1409 (1947); *United States v. Hastings*, 296 U.S. 188, 193, 80 L.Ed. 148, 56 S.Ct. 218 (1935).

Unquestionably, the respondents accurately informed the public about lawful activity and the commercial speech was non-deceptive in nature. The only illegality that attached to the solicitation forbidden by the subject ordinance was simply because of the passage and enactment of the subject ordinance itself. No other illegality attaches to the conduct of the respondents. The subject ordinance does not promote a substantial governmental interest, and argued alternatively, other means of regulation could be achieved which would be less intrusive upon the petitioner's fundamental right to exercise commercial free speech. In short, the four part analysis, as enunciated under *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980), and further refined in *Board of Trustees of State University of N.Y. v. Fox*, ___ U.S.

___, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) was properly applied in conjunction with Florida law.

CONCLUSION

The petition for writ of certiorari should not be granted because the lower tribunals issued opinions based upon adequate and independent state grounds. Further, no conflict exists with applicable decision of this court.

Respectfully submitted,

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